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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

DOCKETED

OCT 16 2009

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COMMISSIONERS

KRISTIN K. MAYES, Chairman  
GARY PIERCE  
PAUL NEWMAN  
SANDRA D. KENNEDY  
BOB STUMP

2009 OCT 16 P 2:15

AZ CORP COMMISSION  
DOCKET CONTROL

DOCKET NO. S-20651A-09-0029

IN THE MATTER OF:

KYLE SCHMIERER, individually and doing  
business as AMADIN,

Respondent.

**FIFTH**  
**PROCEDURAL ORDER**  
**(RESCHEDULES A HEARING)**

**BY THE COMMISSION:**

On January 29, 2009, the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") filed a Temporary Order to Cease and Desist ("T.O.") and Notice of Opportunity for Hearing ("Notice") against Kyle Schmierer, individually and doing business as Amadin and Jane Doe Schmierer, husband and wife (collectively "Respondents"), in which the Division alleged multiple violations of the Arizona Securities Act ("Act") in connection with the offer and sale of securities in the form of investment contracts.

The Respondents were duly served with a copy of the Notice.

On February 20, 2009, a request for hearing was filed by the Respondent, Kyle Schmierer, who represents that he is not married.

On February 24, 2009, by the First Procedural Order, a pre-hearing conference was scheduled on March 23, 2009.

On March 23, 2009, the Division appeared with counsel and Respondent appeared on his own behalf at the pre-hearing conference. The parties discussed the issues raised by the T.O. and Notice and possible resolution of the proceeding. Respondent Kyle Schmierer also stated that he is not married. At the conclusion of the pre-hearing conference, the parties indicated that they would continue to discuss the issues in an attempt to resolve the matter or file a motion to set a hearing or a motion for mediation/arbitration.

1 On March 31, 2009, the Division filed a motion requesting that a hearing be set.

2 On April 2, 2009, Mr. Schmierer filed two letters requesting mediation and requested that the  
3 establishment of a hearing date be delayed.

4 On April 10, 2008, by the Second Procedural Order, a procedural conference was scheduled  
5 on April 30, 2009, to determine whether mediation or a hearing should take place.

6 On April 30, 2009, at the procedural conference, the Division appeared with counsel and  
7 Respondent appeared on his own behalf. The Division indicated that it had provided Respondent  
8 with a proposed form of Consent Order, but Respondent stated that he had not yet reviewed its terms.  
9 The Respondent continued to request that the matter be referred for mediation with time to review the  
10 terms of the proposed Consent Order. The Division requested that a hearing date be set in the interim  
11 during which time Respondent may review the proposed Consent Order and determine whether its  
12 terms are acceptable to him mitigating the need for either form of proceeding.

13 On May 19, 2009, by the Third Procedural Order, a hearing was scheduled on August 31,  
14 2009, but with enough time provided for Respondent to review the proposed Consent Order to  
15 determine whether he agreed to its terms. If Respondent did not agree with the proposed Consent  
16 Order's terms, he was ordered to file, within 14 days of the date of receipt of the Procedural Order, a  
17 request for mediation or his intention to participate in the hearing which he previously requested.  
18 The parties were further ordered to exchange copies of their Exhibits and Witness Lists by June 19,  
19 2009. According to the return receipt which accompanied the Procedural Order, Respondent did not  
20 receive the Procedural Order until June 4, 2009.

21 On June 10, 2009, Respondent filed two motions as follows: a Motion for Mediation; and a  
22 Motion for Release of Essential Information Before Mediation ("Motion for Release"). In his second  
23 Motion Respondent further requests leave to delay the exchange of his Exhibits and Witness List.

24 On June 12, 2009, the Division filed two responses as follows: Response to Motion for  
25 Mediation; and Response to Motion for Release.

26 On June 19, 2009, by the Fourth Procedural Order, Respondent's Motion for Mediation was  
27 held in abeyance and Respondent's Motion for Release was denied because copies of the Exhibits  
28 and Witness List of the Division and the Respondent were to be exchanged on June 19, 2009. Upon

1 the Respondent's receipt of the Division's copies of its Exhibits and Witness List which were to be  
2 introduced at hearing the Respondent should have had the "essential information" needed to prepare  
3 his defense. Additionally, the Respondent was granted a delay in the exchange of the copies of his  
4 Exhibits and Witness List for an additional three weeks, until July 10, 2006, to provide copies of  
5 them to the Division.

6 It was further ordered that the hearing scheduled on August 31, 2009, remain unchanged, and  
7 that in the event a settlement was reached in the case, the Division was to file a motion to vacate any  
8 scheduled proceeding. Lastly, the Respondent was ordered to file notice with the Commission's  
9 Docket Control of his current address and any subsequent address changes.

10 On June 24, 2009, Respondent filed the following three motions: Motion for Release of  
11 Essential Information; Motion Demanding Mediation; and a Motion Requesting a Formal  
12 Investigation of the Division.<sup>1</sup>

13 On July 2, 2009, the Division filed its response pointing on that the Division had previously  
14 addressed the issues raised in Respondent's recent motions and that the Commission's Fourth  
15 Procedural Order had adequately resolved issued raised by the motions.

16 On July 9, 2009, Respondent filed the following three motions: Motion to Delay Deadline for  
17 Filing Witness and Exhibit Lists; Motion Requesting a Formal Investigation of the Division  
18 (essentially a re-filing of Respondent's June 24, 2009 motion); and a Preliminary List of Witnesses  
19 and Exhibits.

20 On August 12, 2009, Respondent filed the following two motions: Motion to Dismiss  
21 Hearing/Jury Trial for My Case; and Demand that Promise of Mediation Option be Upheld.  
22 Respondent also re-filed his June 24, 2009, Motion Demanding Mediation, his July 9, 2009, Motion  
23 to Delay Deadline for Filing Witness and Exhibit Lists, and his June 24 and July 9, 2009, Motion(s)  
24 Requesting a Formal Investigation of the Division.

25 On August 21, 2009, Respondent filed a Motion to Compel Discovery and a Motion for a  
26 Continuance. The Respondent argued that he wanted to cross-examine the Division's investigator

27 \_\_\_\_\_  
28 <sup>1</sup> The first two of these three motions had been filed earlier by the Respondent. These motions were addressed in the  
Commission's Fourth Procedural Order.

1 and further argued that he required a 120 day continuance due to his college class schedule.

2 On August 24, 2009, Respondent filed three additional motions as follows: Motion for  
3 Sanctions for Failure to Comply with Discovery;<sup>2</sup> Motion to Assert My Constitutional Rights and  
4 Demand a Jury Trial; and Motion to Dismiss this Case and Sanctions for Malicious Prosecution  
5 arguing that the offering was exempt from registration.

6 On August 25, 2009, the Division filed a response to the motions filed by the Respondent on  
7 August 21, 2009, as follows: Motion for a Continuance and Motion to Compel Discovery. The  
8 Division argued that Respondent had ample time to prepare for the hearing since the inception of the  
9 case on January 29, 2009, and that Respondent would be able to cross-examine the Division's witness  
10 and present his evidence to rebut that of the Division at the hearing.

11 On August 27, 2009, the Division filed a response to the motions filed by Respondent on  
12 August 24, 2009, as follows: Motion for Sanctions for Failure to Comply with Discovery; Motion to  
13 Assert My Constitutional Rights and Demand a Jury Trial; and Motion to Dismiss this Case and  
14 Sanctions for Malicious Prosecution. In its response, the Division stated that it had complied with all  
15 prior Procedural Orders and that the Respondent had been provided the name of its sole witness and  
16 copies of its exhibits on June 19, 2009, as ordered. The Division further stated the United States  
17 Supreme Court has held that jury trials are not available in an administrative proceeding citing *Tull v.*  
18 *United States*, 481 U.S. 412, 418, n.4, 107 S.Ct. 1831(1987)(citing *Atlas Roofing Co. v. Occupational*  
19 *Safety and Health Review Com'n*, 430 U.S. 442 (1977) (the Seventh Amendment of the United  
20 States Constitution is not applicable to administrative proceedings)). Lastly, with respect to  
21 Respondent's allegation concerning malicious prosecution, the Division cites A.R.S. § 44-2033  
22 which places the burden of proof to prove that an exemption from registration exists upon the party  
23 claiming the exemption, in this case the Respondent. To qualify for such an exemption, the securities  
24 must be offered privately and cannot be offered through a general solicitation. In the Notice, the  
25 Division alleges that the Respondent conducted different investment offerings on the internet using a  
26 number of websites.

27  
28 <sup>2</sup> This motion was filed allegedly for the Division not complying with Respondent's June 10 and June 24, 2009, Motion(s)  
for Release of Essential Information.

1 On August 31, 2009, at approximately 8:50 a.m., prior to the commencement of the scheduled  
2 hearing, the Respondent filed the following three motions: Motion for a Jury Trial (this motion was  
3 previously filed on August 12 and August 24, 2009); Motion for a Continuance (this motion was  
4 previously filed on August 21, 2009); and Motion for Immediate Dismissal and Sanctions (this  
5 motion was previously filed on August 21 and 24, 2009). In filing these motions, Respondent  
6 essentially restated his earlier arguments.

7 Shortly after Respondent filed his three motions on August 31, 2009, the hearing in this  
8 proceeding was convened before a duly authorized Administrative Law Judge of the Commission at  
9 its offices in Phoenix, Arizona. The Division appeared with counsel. Respondent did not appear.  
10 The proceeding was continued over the Division's objections. The Division was further directed to  
11 file responses to the Respondent's motions.

12 On September 3, 2009, the Division filed two responses. The first response addressed two of  
13 Respondent's motions filed on August 31, 2009, his Motion for Jury Trial and his Motion for a  
14 Continuance.

15 The Division, in its first response, noted that the hearing had been continued over its  
16 objections and then proceeded to review Respondent's various motions filed previously and the  
17 rulings made in prior Procedural Orders. The Division specifically described how Respondent has  
18 failed to avail himself of any discovery even after the Division provided him with copies of its  
19 Exhibits and Witness List. The Division further cited the Arizona Administrative Procedures Act  
20 A.R.S. § 41-1001 *et seq.* and the Rules of Practice and Procedure before the Commission, A.A.C.  
21 R14-3-101 *et seq.* and a number of cases that support its position that sanctions are not justified.

22 As was stated by the division in its first response, the Division made available copies of its  
23 Witness List and Exhibits to the Respondent on June 19, 2009, pursuant to the Commission's Third  
24 Procedural Order in this matter. The Division listed only one individual who it expects to call as a  
25 witness, an investigator for the Division. Further, the Division listed only 16 exhibits that it intends  
26 to utilize in the proceeding. The Division earlier adequately addressed Respondent's jury request in  
27 its August 27, 2009, response and during the hearing, Respondent will have ample opportunity to  
28 cross-examine the Division's witness and to object to the admission of exhibits and the grounds for

1 his objections. Lastly, the Respondent will have an opportunity to present his evidence which he  
2 believes will rebut the Division's allegations in this proceeding.

3       The Division, in its second response, summarized the Respondent's previous motions for  
4 dismissal on August 12 and 24, 2009, citing its response of August 27, 2009. The Division described  
5 Respondent's August 31, 2009, Motion of Immediate Dismissal and Severe Sanctions as being based  
6 on his claim that the offering qualifies for an exemption and that the case should be dismissed and  
7 that the Division has abused its power and should be sanctioned. However, as argued by the  
8 Division, pursuant to A.R.S. § 44-2033, the burden of proving the existence of the exemption is on  
9 the Respondent who has raised it as a defense. In the hearing, Respondent will have an opportunity  
10 to present his evidence to rebut the Division's allegations against him. Although Respondent asserts  
11 that his offering is exempt under federal and Arizona law, his motions lack any evidence to support  
12 his assertions. The Division's response amply described the legal prerequisites for an exemption to  
13 exist and Respondent has not met these requirements in his filings. In order to meet his burden of  
14 proof particularly in light of the fact it is alleged that the offering was made by advertising on the  
15 internet, Respondent will have to present his evidence at hearing. Lastly, with respect to  
16 Respondent's request that the Division be subjected to severe sanctions for an abuse of its power, the  
17 Division states that it has complied with all statutes, rules, and prior Commission Procedural Orders  
18 in this proceeding in order to address possible violations of the Act as alleged herein, and there has  
19 been no evidence to the contrary.

20       Accordingly, after numerous motions filed by Respondent, many of which are merely  
21 restatements of those that have been filed previously and ruled against because they lacked  
22 foundation, the relief requested in these subsequent motions should not be granted. However, in the  
23 interest of due process, Respondent's request for a continuance will be granted to allow Respondent  
24 time to conclude his class work and to prepare for a hearing in this matter as was previously ordered.

25       IT IS THEREFORE ORDERED that Respondent's motions filed on June 24, July 2, July 9,  
26 August 12, August 21, August 24 and August 31, 2009, are hereby denied with the exception of his  
27 request for a continuance.

28

1 IT IS FURTHER ORDERED that the **hearing shall be continued from August 31, 2009, to**  
2 **January 21, 2010, at 10:00 a.m.** at the Commission's offices, 1200 West Washington Street, Room  
3 100, Phoenix, Arizona.

4 IT IS FURTHER ORDERED that no further continuances will be granted in this proceeding  
5 absent exigent circumstances and documentation which confirms the reason therefore.

6 IT IS FURTHER ORDERED that Respondent shall promptly file notice with the  
7 Commission's Docket Control of any subsequent address changes.

8 IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113-Unauthorized  
9 Communications) applies to this proceeding as the matter is now set for public hearing.

10 IT IS FURTHER ORDERED that responses to any subsequent motions filed herein shall be  
11 responded to not later than 14 days after filing.

12 IT IS FURTHER ORDERED that any motions not ruled on within 25 days of their filing date  
13 shall be deemed denied.

14 IT IS FURTHER ORDERED that the Presiding Administrative Law Judge may rescind, alter,  
15 amend, or waive any portion of this Procedural Order either by subsequent Procedural Order or by  
16 ruling at hearing.

17 DATED this 16TH day of October, 2009.

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MARC E. STERN  
ADMINISTRATIVE LAW JUDGE

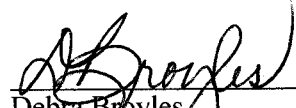
22 Copies of the foregoing mailed/delivered  
23 this 16TH day of October, 2009 to:

24 Kyle Schmierer  
25 220 West Behrend Drive  
26 Phoenix, AZ 85027

27 Matt Neubert, Director  
28 Securities Division  
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By:

  
Debra Broyles  
Secretary to Marc E. Stern